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Eskegrove, Sir David Rae, Lord.
October 18. 1769.

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Andrew Johnston of Rennyhill, and Mrs Anne Law merchant in Edinburgh,

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The PETITION of the Trustees of the Creditors of Adam and Thomas Fairholms bankers in Edinburgh.

THE petition now to be answered is very elaborate, and illustrates, with much accuracy and ingenuity, the arguments which have been unsuccessfully urged, on the same side, in every case of the like kind that has occurred for these many years past. The petitioners say, That for the good of the public, they have submitted this question to your Lordships, "in order to have the law settled, and that the country may know whether such trust-dispositions can be effectual or not." And had the point never been before solemnly adjudged, the motive assigned would certainly have been a good excuse for arguing it at full length; but if, on the contrary, the respondents are right in their apprehension, that this question has been tried and determined, upon the most mature deliberation, in various cases, it will seem impossible to foresee when such a point of law shall be held as fixed and established; especially as the industry of parties will always enable them to find out some fact or circumstance, however immaterial, in which one case may be said to differ from another. However, as the question is perfectly understood

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flood by your Lordships, the respondents shall endeavour to bring their answers within a pretty moderate compass.

The bankruptcy of the Mess. Fairholms was a severe blow to many that had the misfortune to be engaged with them. The respondents were two of that number; and their case was peculiarly hard. Mr Johnston's father never had any dealings with the Fairholms, of his own choice; but in February 1764, a correspondent of his happened to remit to him the sum of L. 222 Sterling through their channel; and for which, instead of the money, the Mess. Fairholms, then on the eve of their bankruptcy, were pleased to send Mr Johnston their own bill; to which the respondent, his son, has now right. And as for the other respondent, Mrs Law, her case is most deplorable. She had made an honest shift to earn a livelihood for many years, by keeping a shop; and any little money she could save, she lodged with the Fairholms, from time to time, upon promissory notes; whereby, at their bankruptcy in the end of March 1764, she had L. 394 Sterling in their hands, being all that she had in the world to support her under the pressure of old age, total blindness, and other infirmities. Under such circumstances, should she now operate her full payment, attended with the loss of a mere trifle to others, they would seem to be rather hard-hearted creditors who would grudge it.

The respondents were naturally astonished at the bankruptcy; and as they were totally ignorant of the Fairholms's affairs, they in that state resolved to take no measures whatever that might tend in the least to restrain them from operating their payment by legal diligence, so soon as they could discover the means of using it in a proper way. This the trustees and other creditors well knew from the beginning; and that the respondents could not be expected to accede to the trust. Hence they never signed the deed of accession: they never attended, by themselves or doers, any meetings of the creditors: they never lodged with the trustees any notes of their debts, when required by advertisement, as was done by Dr Heriot, and many others: and, in short, they never gave the least cause, either directly or indirectly, for the bankrupts, or others concerned, to believe or expect, that they ever would accede to that trust-right. Indeed this fact seems now to be confessed by the petitioners; who acknowledge, that they had erroneously set out with alledging, that the respondents, or their agent, had attended meetings of the creditors, without objecting to the disposition,

sition, or common measures proposed, and had thereby virtually approved of the trust-right. The very reverse of this appeared upon inquiry, and obliged the petitioners to acquiesce in a judgement repelling that defence.

The petitioners, however, when resorting to the general point of law, endeavour to conciliate favour to their plea, by observing, That the respondents did not use arrestments sooner than December 1764, being several months after the bankruptcy, and after some of the funds had been recovered by the trustees, and by them lodged in the banks. This procedure the petitioners impute to a principle of self-interest, and a desire of taking an *undue advantage* of the other creditors.

But the petitioners complain of this delay on the part of the respondents with an exceeding bad grace. Their postponing diligence for a few months, instead of a hardship upon, was a favour to the acceding creditors, as it gave them and their trustees full opportunity, not only of collecting the bankrupt's funds, but also of securing themselves upon them by legal diligence, against the attempts of outstanding creditors, of which there were then a great number. The petitioners talk much of having acted by the *best advice*; and if that be so, they could not be ignorant of the necessity of using such a precaution for the better supporting their trust-right. In fact, during that period, diligence, by arrestment and otherwise, was done in the name of many of the acceding creditors, the effect of which is still reserved to the petitioners in this question with the respondents. On the other hand, the respondents were kept totally in the dark where the bankrupts effects might be found, and consequently could not attach them sooner than they did, which was immediately on their discovering where these funds lay.

How then can the respondents be blamed, or can it be the subject of regret, that their diligence should now operate their payment, through the remissness of the trustees, or those for whom they act, in not completely securing their preference upon the whole funds *in medio* by the like diligence, during the time which the respondents allowed them for that purpose? And having thus arrested sums infinitely beyond what would answer their payment, it is not said that the respondents lost time in taking the necessary steps to follow out their diligence, by insisting in the reduction of the

the trust-right, without which they were advised that they could not draw their money.

This process has depended for several years, and has been retarded in its progress by every objection which the petitioners could devise, and which were made the subject of many representations. Hence the respondents could not obtain an interlocutor upon the merits of the reduction sooner than the 19th of February 1768, when the Lord *Gardenston* Ordinary "sustained the reasons" of reduction of the trust-disposition libelled, in so far as the pursuers have an interest therein; and reduced, decerned, and declared accordingly; and appointed parties procurators to be ready to debate on the effect of the arrestments founded on by the "pursuers against next calling." This interlocutor has simply freed the respondents from being affected by the trust-right, but has ascertained no preference to them; and it is yet *sub judice* what shall be the effect of their arrestments, in competition with the legal diligence done by the petitioners, or the acceding creditors.

Since February 1768, the cause has been kept in this state by no less than four successive representations, several of them of great length; and two of which, upon answers, and the others without answers, were refused by repeated interlocutors of the Lord Ordinary. At length the petitioners have brought the question before your Lordships by this petition; to which these answers are humbly offered.

The petitioners have set out with giving a detail of the bankrupt proceedings, and those of their trustees, for some time subsequent to their bankruptcy; from which they infer, that the whole was a fair and equitable transaction; that the bankruptcy was owing to losses in the stocks; that the trustees were named or approved by the creditors; and that no unreasonable conditions were imposed upon them.

Were it material, the respondents would at large controvert all and each of these propositions; but it will suffice here shortly to observe, that not long after the bankruptcy, all concerned had too much reason to believe, that the creditors had been deceived by the representations at first made to them: These things have been the subject of disquisition in other processes, particularly in the case of Dr Heriot, who, on that account, endeavoured to withdraw his accession. He, *inter alia*, averred, That the bankruptcy was not occasioned

occasioned by losses in the stocks, but by gross mismanagement at Edinburgh.

And after all the praises which the petitioners have bestowed on this trust-right, the respondents must beg leave to say, that it is far from meriting more favour than others which have been reduced by this court. The deed itself was devised, framed, and executed, by the bankrupts, before their bankruptcy was divulged. The trustees were therefore entirely of their own nomination; and though a majority of the creditors who attended the first and second meetings, were induced, rather precipitantly, to approve of it, yet it is believed many of them have heartily repented their so doing. Indeed those creditors went most unreasonable lengths in favour of the bankrupts. They obliged themselves, and the creditors who should accede, to submit to those trustees all objections to their debts; and even empowered the trustees, not only to employ Thomas Fairholm in the management, as they have accordingly done, but to discharge him altogether.

These measures were so extraordinary, that Dr Heriot was relieved from them, although he was found to have acceded to the trust-right. But even taking that right by itself, there is not the least reason for imposing it on creditors against their will. Why should the bankrupts, or even a majority of their creditors, have the power of chusing trustees to act, not only for themselves, but for the minority of the creditors; and to declare, as this right does, "That these trustees shall not be liable for diligence, nor for omissions, nor *in solidum*; but that, besides their expences, they shall be intitled to a gratification for their pains and trouble." Surely in no other case can factors with such privileges be imposed on persons capable of acting for themselves. Nor is it less material, that the deed expressly obliges the whole creditors to draw their shares *equally*, and thereby ties up their hands from afterwards doing diligence, and brings in the most slothful equally with the most attentive. It cannot be pretended, that a debtor who is not bankrupt, can impose such conditions on his creditors, or hinder them from doing diligence; and it is quite incomprehensible to the respondents, how his bankruptcy should be made a pretext for giving him more ample powers in that respect.

It has been long the object of the attention of the legislature of this country, as well as of the supreme court, to prevent the frauds committed by debtors, upon occasion of their bankruptcy. The

laws of all countries have provided rules for doing justice to creditors in such cases ; but the means adopted by each, have been different. Whatever respect we have had to the Civil law, it certainly has not been received with us in its full extent, respecting this matter : still less have we followed the law of England upon this head ; and in all cases that occur, it is our own law, and not the law of other countries, that must be the rule. Neither, with submission, does it belong to your Lordships, properly speaking, to make new laws from motives of expediency, but only to apply or explain those that already exist : yet the bulk of the ingenious argument in this petition, clearly tends to the making a new law, fitted to the petitioners purpose ; and thereby overthrowing what is now understood to be fixed and established, under a statute already made, and in force.

The genius of our law has, perhaps, been more fertile than that of any other, in devising various modes and forms of diligence, whereby creditors may compel their debtors to pay, or operate payment out of their effects. The giving full weight to such diligence, has been throughout a favourite object, and all our statutes concerning bankrupts evidently appear to have it specially in view ; so that any practice or decision tending to disappoint the effect of legal diligence, if not authorised by a new statute, must be held as running counter to the very genius of our law.

More particularly, with regard to the act 1621, it appears, that at that early period bankrupts had fallen upon two capital devices for disappointing the diligence of their creditors. The first of these was, the granting voluntary conveyances to conjunct or confident persons, without true, just, or necessary causes. These conveyances the legislature justly set aside, at the suit of any prior onerous creditor, although he had done no diligence whatever. The other device was this, That when a bankrupt saw one or other of his creditors for whom he had no favour, proceeding in diligence against him, he directly made over his effects to some other favourite creditor who had taken no such step. This was also redressed by the same statute, which likewise sets aside such conveyances, at the suit of the creditor who had done the prior diligence.

The petitioners say, That these enactments were made, merely to preserve equality in the distribution of a bankrupt's estate. And so far it is true, that they prevented the bankrupt himself from either totally abstracting his effects, or making an unequal distribution of

of them, after diligence done against him. But it is no less plain, that the legislature did not then intend to put all the creditors upon an equal footing, the most slothful with the most diligent. The *pari passu* rankings of adjudgers and executors were then, and for many years thereafter, unknown and unthought of; and the clear and express intendment of the act 1621 was, to leave the bankrupt's estate open to the diligence of his creditors, and even to give a preference to those creditors who were most active in first using that diligence; which was understood to be the proper means for ascertaining the particular creditors shares of the bankrupt's effects.

But however salutary these provisions were, they still fell short of fully answering the end in view. Other devices were fallen upon to elude it; and particularly, the granting voluntary conveyances to favourite creditors was still practised with success, in prejudice of those other creditors who had not done prior diligence. Those disponees, through the partial favour of the bankrupt, frequently obtained their full payment, without having used any diligence more than the others who were less favoured, although such diligence was the only lawful means for operating payment from a debtor under such circumstances. Hence the act 1696 was made; which did not disable every debtor who was *lapsed*, from fairly making payment and satisfaction of his debts; but wisely fixed a criterion of bankruptcy, which should thereafter disable persons falling under it, from at all interfering, by conveyances in the disposal or application of their effects.

The statute intended, that all those effects should be left open as they stood at the time of the bankruptcy, to be affected and applied for the payment of debts according to the due course of law, and of that diligence which the creditors might think fit to use and pursue. The legislature accordingly expressly enacted, "That *all and whatsoever voluntary dispositions, assignations, or other deeds,*" granted by notour bankrupts, either at or after their becoming so, or within the space of sixty days before, to any of their creditors, either in satisfaction or further security of their debts, in preference to others, should be *void and null*; and should be so found, at the suit of any of their just creditors whatever.

This statute laid the axe to the root of the evil, and effectually tied up the hands of notour bankrupts from defrauding any of their creditors by voluntary conveyances. But further the statute did not go. It did not provide, or even intend, as the petitioners seem to insinuate,

insinuate, that the consequence should always be an equal distribution of the whole estate among the creditors. It disabled the bankrupt from making any distribution whatever in the way of conveyance ; but it did by no means exclude or set aside the legal diligence of creditors ; but, on the contrary, left them at full liberty to use that diligence, each for his own behoof, as was by law competent to them. The *pari passu* ranking of adjudgers by the act 1661, and the same ranking of executors and creditors of defuncts doing diligence within six months by the act of federunt 1662, were then well known, and were left in full force in those cases to which they might apply. But no further equality among creditors was thereby introduced as to personal, any more than as to real estates ; although it cannot be with justice alledged, that moveable or personal estates in this country were then so inconsiderable as to have escaped the legislature's attention, far less that the distribution of them was intended to be still left to the pleasure of notour bankrupts, in exclusion of the operation of legal diligence.

In so far as equality among creditors has been established upon certain subjects by the acts 1661 and 1662, the respondents do not mean to call it in question, because such is the law ; but where the legislature has not thought fit to establish such an order of ranking, they do humbly conceive, that it is not even the province of a court of law, far less of a notour bankrupt himself, to introduce it, whatever may be the seeming equity with which it is thought to be attended. Indeed the respondents may presume, from the act of federunt 1754, respecting the *pari passu* ranking of poinders and arresters, having been suffered to expire, that the petitioners doctrine, of adopting every measure for preserving equality among creditors, especially upon personal estates, has not been always received ; or that the application of it has been found to be attended, in practice, with more inconveniency to the public, than the suffering creditors to take care of themselves by using legal diligence independent of each other.

The petitioners argue, upon the words of the act 1696, That because it strikes against dispositions granted by a bankrupt to *any* of his creditors *in preference to other creditors*, it cannot apply to such a disposition as this in question, which is granted in favour of *all* the creditors *equally*, without preferring any of them to the rest.

The respondents have the greater deference for this argument, that it appears for some time to have been the prevailing opinion of the

the court. But your Lordships predecessors, many years ago, came to alter that opinion, and to hold, that such dispositions as this, as well as others, do fall under both the words and intendment of the statute. It is a criticism which cannot be admitted as just, That when the statute speaks of a disposition to *any* of the creditors, it means to limit the challenge to deeds in favour of certain individuals, and that it should not extend to those apparently granted in favour of the whole. The statute makes no distinction as to the form of the deeds, or whether they are granted to the whole creditors, or only to a part of them; for still if they appear to be an alienation of any of his effects in favour of creditors, they fall under the prohibition of this act.

Neither is there more strength in the objection, That the disposition is not in prejudice of other creditors, because it is granted to the whole. It is certainly in prejudice of the whole, or at least of all who do not voluntarily accept of it, when it evidently tends to compel them to submit to a mode of management and distribution, not of their own choice, and to deprive them of the power of using that diligence with which the law has armed them for operating their full payment, and, contrary to the principle of law, That *vigilantibus jura subveniunt*, gives the same advantage to the most indolent and neglectful with those who are the most active and diligent. In short, the plain intendment of the statute is, to tie up the bankrupt's hands, after a certain period, so as not to leave it anywise in his power, by voluntary conveyances to creditors, to interrupt the course of legal diligence. And indeed the very words are express to that effect, by declaring *all and whatsoever voluntar dispositions*, &c. made by a notour bankrupt to his creditors, without any distinction or exception, to be void and null.

The petitioners further argue, That a disposition of this kind is a just act, which ought to be supported; that it would be a reproach to the law of a country, to disable a bankrupt from doing equal justice to all his creditors; that such a law would be destructive to trade and credit, as totally excluding creditors at a distance from any chance of coming in for a share; and that it would, in many cases, create immense losses, as many bankruptcies have, and still may occur, when the estates of the bankrupt are situated in countries where they cannot be attached by legal diligence.

It might here suffice for the respondents to answer, That *ita lex scripta est*; and that however hard it may be, this is not the proper place for obtaining an alteration of it. But the objection itself is

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not well grounded; and, if sustained, would strike much deeper than the case now in question. Few instances occur of creditors at a distance (who have commonly active agents on the spot) suffering by the creditors at hand getting the start of them in diligence; and if the apprehension of such inconvenience could have weight, it would equally apply to the setting aside even prior diligence done, where the debtor is not a notour bankrupt, although insolvent at the time. This would be a repeal of the act 1621; which expressly sustains prior diligence, although the debtor is insolvent. Nor can any good reason be assigned, why the bankrupt should have the power of excluding, by a voluntary deed, that diligence which is posterior to his disposition, more than that which is prior to it.

It cannot be said, that the trade and commerce of this country has flourished less since the decision in the 1734, in the case of *Snee*, than it did before that period; and there is surely less cause to apprehend danger from the law's continuing on the same footing, than from its being perpetually variable and fluctuating. Neither can any benefit arising from dispositions of effects in foreign countries be excluded by that law, as it cannot operate *extra territoriam*. And if a case can be supposed, where effects are so situated, as that they can be reached by no diligence whatever, such a disposition of those effects may possibly be sustained as beneficial, and not prejudicial, to the creditors. But that is not the case at present, where the effects are confessedly in Scotland, and can all be attached by the diligence of this country.

The respondents acknowledge, that it was a long time a speculative question, attended with a good deal of doubt, whether such trust-dispositions were truly beneficial or hurtful? This court, for some time, considered them in a favourable light: but experience discovered how pernicious they were; and then the court returned to the observance of that construction of the law, from which an inclination to equity had diverted it.

By such deeds, the hands of creditors were found to be tied up, and the estates of bankrupts frequently thrown under the management of persons of the bankrupt's own nomination, whose fidelity and diligence was unknown to most of the creditors. The trustees were not bound to do diligence, but were freed from all omissions; and whether they managed well or ill, the creditors were obliged to take what share of the effects they were pleased to allow.

These grievances became at length intolerable; and have therefore been properly rectified by the later practice of the court: and

as general rules must be observed, so it can now make no distinction, whether the trustees are men of known character and integrity or not; or whether many or few of the creditors have acceded. If the disposition is itself reducible by non-acceding creditors, these circumstances must go for nothing.

Although the making an equal distribution may, at first view, appear favourable; yet where is the law or the expediency for authorising a bankrupt to compel his creditors to desist from diligence, and receive such mode of management and distribution as he shall think proper? or to trust the whole in such hands as he is pleased to place it? Or even supposing some of the creditors to concur in the nomination of trustees, what intitles them to chuse for others, who never concurred, and who perhaps have not the like confidence in the persons elected by them?

Besides, it must be allowed, that the creditors cannot compel the bankrupt, if unwilling, to grant such a disposition; and it is apparently absurd, that he, on the other hand, should be intitled to compel them to accept of it. If it is just and expedient, that in all bankruptcies the effect of diligence should be stopped, and an equal distribution made among the creditors, our law must certainly be extremely defective, if it makes the bankrupt himself the sole dispenser of this justice, and leaves it optional in him to do it or not as he thinks fit. Such power is apparently adverse to the words and intendment of the act 1696; and it is abundantly obvious, that were debtors allowed, under pretence of executing dispositions in favour of their whole creditors, to circumscribe and frustrate the effect of the diligence of particular ones, they would easily fall upon schemes to give more substantial preferences to those whom they were willing to favour; and many more bad consequences must flow from such a privilege, than would be sufficient to overbalance the trivial advantages which might be supposed to be obtained by it.

Sensible of the difficulty attending their plea, the petitioners endeavour to gain some aid to it, by observing, that their disposition was not only executed by the bankrupts, but *completed* by their getting hold of the effects before the respondents diligence. But this argument has been over-ruled in every case where it was pleaded, as appears from the decisions quoted in the petition itself; particularly the case of *Mudie*. Nothing can be plainer, than that, if the disposition itself is null and void *ab initio*, according to the express enactment of the statute, it cannot be rendered better or stronger

stronger by any delivery, possession, or completion, in the persons of the disponees. Indeed, so far has the legislature been from considering this point in the light in which the petitioners put it, that the act 1696 has declared, that such dispositions, when of heritable subjects, shall only be reckoned, as to this case of bankruptcy, to be of the date of the seisin taken thereon; in order, that if the seisin is within the sixty days, the deed upon which it proceeds may be reduced, although it truly was executed by the bankrupt without or before that period. Infestment does surely as much complete a disposition of lands, as intimation or possession of any kind can do a conveyance of moveables; and as the one gives no aid to the validity of the deed, but rather the reverse, as little can the other do so.

So much being humbly submitted to your Lordships in point of argument upon the general question, it remains to take notice of the decisions that have occurred, and are mentioned in the petition; upon a view of which, the respondents apprehend, they may safely conclude, that if any point of law can be held as determined by judgements of this court, the present one stands thereby clearly established, agreeable to the interlocutor now under review.

The petitioners have been able to point out only two decisions earlier than the 1734, which they found upon as favourable to their plea.

The first of these is that of *Watson contra Muirhead*, in the 1725; of which the petition gives a full account: and the respondents have no occasion to dispute, that the case stands as there represented. It was apparently a favourable case; and being the first that occurred, it can be no surprise, that the idea of equity with which it seemed to be attended, had such impression on the humane disposition of the judges, as to lead them into a construction of the law, which the respondents may now term *erroneous*; especially as the bad consequences of such a decision were not then sufficiently felt or foreseen.

The same equitable principles appear to have led the court still further in the second case, of *Farquharson and Cuming*, in the 1729; which the petitioners themselves admit to have been rather too strong a decision in favour of trust-rights, as being directly against the positive enactment of the statute 1621; and which was therefore altered in a similar case in the 1735, *Mansfield contra Brown and Stobie*.

So stand the decisions in that early period: And the next in order is

is that of *Snee contra* the creditors of Michael Anderson, in the 1734, when the general point of law was fully argued, and most maturely considered by the court; and when their Lordships did most solemnly determine, that dispositions of this kind do fall under, and are reducible upon the act 1696. *Anderson's* disposition was so far like the present one, that it was granted to trustees for behoof of all his creditors, in order to have the effects equally divided among them; that the trustees were exempted from being liable in omissions; and that many of the creditors had acceded thereto. So far, then, the judgement would have applied, had it been strictly confined to the case between the parties: and although the petitioners are at much pains to distinguish the import of that disposition from the present one, yet it is obvious that some general rules must take place; and that if the validity of such dispositions was to depend on any peculiarity in the clauses, the fate of them would be involved in total darkness and uncertainty, and a door would be opened to endless contention and disputes concerning them.

Justly apprehensive of this consequence of determining the cause on the specialities of the disposition, the Lords, in that case, most properly resolved to establish the general point, as to the effect of the act 1696, upon all such dispositions, and to give notice to the public that these would be no longer sustained. The learned collector observes, " That the Lords found the reasons of reduction relevant; and at the same time laid hold of this opportunity to declare their sentiments against all such dispositions in general; and in that view caused insert the following clause in their interlocutor: *And further find, That no disposition by a bankrupt debtor can disable creditors from doing diligence.*"

The petitioners upon this are pleased to observe, " That the declaration of a court, not applicable to the case argued before it, ought not to be much relied upon for settling the law; especially when such judgement or declaration is conceived in words of ambiguous meaning." But the respondents must confess, that they can find no ambiguity in the words alluded to; and they must be allowed to think, because the court thought so, that as your Lordships are the interpreters of the law, so the explanation of its meaning in a doubtful point could not be more aptly made, than by such a declaration; which was not foreign to the cause, but showed, that, independent of the specialities in the disposition under trial, the court held, that its being granted by a notour bankrupt, with a view to disable his creditors from doing diligence, and

to bring them all in equally, was alone sufficient to reduce it upon the act 1696. Had the court only meant that such disposition could not disable creditors from doing diligence *before* it existed, the declaration would indeed have been superfluous; but no such meaning was ever put upon that declaration; which, on the contrary, clearly applies, and has always been understood to apply, also to diligence done *after* the disposition. Since the period of this decision, it has likewise been held by the writers on our law, as well as by the practitioners, to be a fixed point, that all such dispositions are reducible upon the act 1696, at the instance of any creditors who have not acceded to the trust-right.

Again, in the next case of the kind which occurred, viz. that of Lord Aberdeen *contra* Blair's trustees, 3d February 1736, the Lords gave another decision, exactly agreeable to what had been found in the case of *Snee*.

The petitioners indeed observe, That the contrary was found in November 1757, in the case of Simpson *contra* the trustee and creditors of Jackson. But independent of the circumstances of that case noticed in the petition, it is undoubtedly sufficient to distinguish it from the present, and to show that the general point of law did not come to be considered, that previous to the disposition the acceding creditors had used separate diligences, whereby they had attached the effects falling under it, and ascertained their shares in the division thereof; the effect too of which diligence was expressly reserved to them in the disposition; and consequently *Simpson*, who had himself done no diligence, could not afterwards, by an arrestment in the hands of the trustee, carry off those effects, and disappoint the preference which the acceding creditors had obtained upon them, even independent of the disposition. Accordingly your Lordships did very justly assilzie the trustee from *Simpson's* process of forthcoming.

The next case is that of Elisabeth Mudie *contra* the Trustees of Robert Strachan, in 1764, which the respondents have founded upon, and they apprehend justly, as a precedent in their favour, almost as strong as the decision in the case of *Snee*.

The petitioners have in like manner endeavoured to distinguish it from the present, by specialties said to have attended it; but the respondents cannot altogether agree in their representation of it. *Strachan's* disposition was in favour of trustees for all his creditors. It contained no other preference than what had been long before established, in favour of one creditor by infestment on a tenement belonging to him, and in favour of another by legal hypothec as landlord

landlord of a house which *Strachan* then possessed. The deed was therefore as fair and unexceptionable as any of the kind could possibly be; and was completed as to the heritage by infeftment, and as to the moveables by possession, and even by roup, and converting them into money, before Mrs *Mudie* used arrestments in the hands of the trustees.

It is true that a few days prior to the disposition, she had raised, though not executed, an inhibition, and also raised a horning, and used arrestment against other debtors of the bankrupt; but it is also true, that previous to any of these steps of diligence, the trust-right had been resolved upon, and at the solicitation of the other creditors a disposition was actually executed to a trustee of their nomination; but he having declined to act, a second disposition was necessarily granted to other trustees, also of their nomination, some days after the horning and inhibition were raised by Mrs *Mudie*. She therefore did not think herself founded in a reduction on the act 1621, but only insisted upon the act 1696; and accordingly your Lordships did most deliberately consider it as a case depending upon the general point decided in the case of *Snee*, and gave judgement agreeable thereto.

This appears from the express words of the interlocutor, which “ finds sufficient evidence, that Robert *Strachan*, the common debtor, was reduced to the state of a notour bankrupt in terms of the act of parliament 1696, within sixty days from the date of the disposition made by him to the defenders of his estate; and therefore reduces that disposition so far as concerns the pursuer; and finds the pursuer intitled, in virtue of her arrestments, to recover from the arrestees such sum as she would have right to if no such disposition had been made.” And after decerning against certain debtors of the bankrupt, the interlocutor likewise “ finds her intitled, in virtue of her arrestments in the defenders the trustees hands, to any effects of the common debtor they are possessed of, and the prices of such of his goods sold as they have received, except in so far as the said trustees are in condition to show that they, or the other creditors, are intitled to controvert the pursuers preference upon grounds in law, independent of the disposition reduced as above.”

The same point was last of all disputed in the 1767, between Mess. *Peters* and the trustees of *James Dunlop*. The like judgement was there also given as in the cases of *Snee*, *Blair*, and *Mudie*,
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and the decree was affirmed by the House of Lords. After which *John Monro*, another creditor of *Dunlop's*, was likewise preferred upon arrestments in the hands of the trustees themselves.

The petitioners indeed observe, that the judgement of the House of Peers did not go upon the general point, but upon a speciality of the disposition's having reserved a partial preference to the bankrupt's friends, who had become sureties for him in certain bonds to the crown, and without which condition they would not have been intitled to any preference by the aid of the crown. This the respondents can neither admit nor deny, as they confess themselves entirely ignorant of the reasons that influenced that Honourable House, farther than appears from their judgement, which bears no specialty, but in general affirms your Lordships decree. But even supposing the proceedings above to be such as represented in the petition; yet the respondents are informed, that your Lordships proceeded on the general point of law; and consequently your judgement in that case, as well as in the three former ones, is still a precedent in favour of the present interlocutor; and the respondents do hold it as certain, that from the 1734, down to this day, all the decisions of the court, in the like cases, have been uniform, and agreeable thereto.

And when such are the authorities adduced for the respondents, they may with great deference observe, that they cannot be shaken by the quotation given in the petition from the *Principles of Equity*. That learned author expressly approves of the principle first laid down by the court in the case of *Snee*, " That no disposition by a bankrupt can disable his creditors from doing diligence;" and declares it to be " founded in justice and expediency, and which ought to govern the court of session as a court of equity." He indeed distinguishes between dispositions imposed by bankrupts upon their creditors, and those which are solicited from the bankrupts by their creditors to trustees of their own naming; and is of opinion, that though the former should be reduced, the latter ought to be sustained. How far the disposition now in question falls to be viewed in the one or the other light, is humbly submitted; but even taking it in the most favourable view, the respondents apprehend, that it must fall under the act 1696, and the decisions of the court already referred to. — And Lord Bankton, after mentioning the rule laid down in the case of *Snee*, and observing that the Lords have ever since followed it, gives his opinion, " That considering the expences of management, and the leisurely procedure frequently in prosecution of these trust-dispositions by
" bankrupts,

" bankrupts, there is no reason for encouraging them beyond the " letter of the law." And he adds other reasons why such trust-rights are justly found to be within the statute, even although the majority of the creditors agree to the measure.

After concluding their argument on the general point, the petitioners have stated a separate question to your Lordships, viz. Whether the respondents, after the bankrupts estate was converted into money, and that money deposited in the banks for the behoof of the creditors, could effectually attach it by arrestments used against the trustees and banks, and insist for reduction of the trust-disposition in order to give their arrestments effect?

The petitioners say, That as the Fairholms were not divested of their estate by becoming bankrupt, the disposition was effectual while unchallenged; and that the money having been paid into the bank for behoof of the creditors before any challenge, the same was equivalent to the money's having been directly paid over by the bankrupts to them, agreeable to what was found in the case of *Souper contra Smith*; and that, at any rate, the arrestments are inept, as neither the trustees nor the banks are debtors to the bankrupts, but to the acceding creditors, *quoad* the extent of their shares. And upon this last point also some decisions are referred to.

But, in the *first* place, It is obvious from the interlocutor, and is even admitted by the petitioners, that their argument on this point is rather prematurely stated; the Lord Ordinary having as yet only reduced the trust-right, so far as the respondents have an interest, without ascertaining the further effect of the arrestments. The respondents, however, have no objection to your Lordships likewise determining this point at the same time with the other; and indeed, when the disposition is once reduced, there is evidently nothing at all in this question.

For, *2do*, If once the trust-right is reduced, it must follow of course, that neither the trustees, nor the acceding creditors, have any title to the money or effects of the bankrupts in virtue of that right; and consequently the same remains the property of the bankrupts, and must be affectable by the diligence of their creditors, as owing or belonging to them. In all the other cases adjudged since the 1734, it has been justly considered, that a disposition or conveyance of debts and funds, though afterwards converted into money by the trustee or creditors, is no wise similar to payments in money directly made by the bankrupt to his creditors. Such a conveyance is an alienation of property, which the

law intended should remain with the bankrupt till taken out of his person by diligence. And hence, in the cases of *Mudie*, and *Peters*, &c. the arrestments in the hands of the trustees themselves have been found effectual to carry the money which they had previously uplifted and received, in virtue of the disposition, from the debts or effects of the bankrupt.

The decisions quoted by the petitioners on this head are truly nothing at all to the purpose. In the case of *Souper contra Smith*, your Lordships will observe, that *Smith* was only insolvent, and not a notour bankrupt; and consequently his disposition was not reducible on the bankrupt-acts. Neither did he dispoise his whole effects to trustees, but only caused them sell his furniture and liquors; which having been accordingly done, it was found too late for another creditor to gain any preference by arresting the price.

The other decisions, of *Campbell contra Faichney*, and *Stalker contra Ayton*, do as little apply; as they relate only to the propriety of arrestments used in the hands, not of a debtor to the common debtor, but of the debtor's factor or trustees; neither of whom are held to be debtors to the common debtor. In the present case, it is impossible to deny, that when the disposition is laid aside, both the trustees and the banks remain debtors to the bankrupts, or custodiers of the money and effects for them; seeing, in competition with the respondents, the acceding creditors have no longer any title thereto in virtue of the disposition.

In arguing upon this point, the petitioners admit, "That so far as there are other creditors who have refused to accept of the disposition, or accede to the trust, the respondents may have attached their shares of the money, because so far the money remains the property of the bankrupts." And, agreeable to this doctrine, the same must be the case as to the shares of the acceding creditors, when once the disposition is reduced. Indeed this admission seems to be totally destructive of the petitioners plea on the general point: for it tends to reduce the trust-right to so many partial conveyances as there are acceding creditors; and it cannot be denied, that every partial disposition to particular creditors is reducible on the act 1696, and the subject conveyed affectable by the diligence of other creditors, although it should appear, that such subject would not exceed in value the proportion falling to the dispoinee upon an equal distribution of the bankrupts estate among the whole creditors.

In respect whereof, &c.

D A V. R A E.